No. 97-1763

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

MATRIX COMMUNICATIONS CORPORATION,
Petitioner,

v.

MCI TELECOMMUNICATIONS CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF IN OPPOSITION FOR RESPONDENT

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BRIEF IN OPPOSITION FOR RESPONDENT

Respondent MCI Telecommunications Corporation ("MCI"), through its counsel, submits this brief in opposition to the Petition for a Writ of Certiorari ("Petition") filed by Petitioner Matrix Communications Corporation ("Petitioner"). Petitioner seeks review of a unanimous decision of the United States Court of Appeals for the First Circuit affirming the district court's order compelling arbitration and the district court's denial of Petitioner's motion under Federal Rule of

Civil Procedure 60(b) to vacate that order. The Petition is without merit and should be denied.

STATEMENT

Petitioner is a former external sales agent that sold telecommunications services for MCI. Effective October 1, 1995, Petitioner and MCI entered into an Authorized Sales Agent Agreement (the "Agent Agreement"). (App. 42.)[1/] The Agent Agreement granted Petitioner a limited agency to sell MCI services to certain categories of customers in return for commissions based on the amount of telephone usage generated by those customers. (App. 42-43, 45.)

The Agent Agreement authorized MCI to terminate the contract upon ten days' notice if MCI discovered "irregular marketing activity" by Petitioner. (App. 55.) In the spring of 1996, MCI discovered substantial irregular marketing activity, including the use by Petitioner of unauthorized subagents to sell services under the agreement, widely disseminated unapproved advertising, and the misuse of MCI's name and marks. (App. 51-53; R. 286-98.) MCI terminated the Agent Agreement because of those breaches. (R. 287.)

In June 1996, Petitioner sued MCI in Massachusetts state court. (R. 10.) The complaint alleged a variety of tort and

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1/ In this Brief, citations to the Appendix filed by Petitioner are designated "App. ___." Citations to the Record on Appeal in the lower court are designated "R. __," and citations to the Addendum to the Record on Appeal, filed by MCI as an attachment to its brief in the lower court, are designated "R. Ad. ___."

statutory claims against MCI, all of which derived from the performance or termination of the Agent Agreement. (R. 10-22.) MCI removed the action to federal court and, in July 1996, moved to compel arbitration pursuant to the arbitration clause in the Agreement. (R. 41, 99.)

The Agent Agreement's arbitration clause is express and unequivocal. It provides:

> Any dispute relating to this Agreement shall be submitted for binding arbitration in accordance with the rules contained in MCI Tariff FCC No. 1 and judgement [sic] on any award entered therein may be entered in any court of competent jurisdiction.

(App. 59.)

Petitioner opposed MCI's motion to compel arbitration. Petitioner argued that because the Agent Agreement's arbitration clause incorporated MCI's Tariff arbitration rules by reference, the only disputes that could be arbitrated were those involving MCI's invoices for services provided to customers under MCI's Tariff. (R. 329-31.)[2/]

On September 27, 1996, the district court heard argument on MCI's motion to compel arbitration. During the hearing,

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2/ MCI's Tariff contains arbitration rules that govern the conduct and procedure for arbitrations initiated under the Tariff. (R. Ad. 26-33.) Those rules include a provision that requires arbitration of all disputes between MCI and its customers involving the payment of invoices over $10,000. (R. Ad. 26.) In the original district court proceeding, Petitioner based its opposition to arbitration on this provision.

the court indicated that it intended to direct arbitration of the claims in Petitioner's complaint. (R. 918, 928, 935, 940.) Later that day, the judge signed an order compelling arbitration. (R. 976-77.) Before that order was entered, however, Petitioner filed a notice of voluntary dismissal under Federal Rule of Civil Procedure 41(a)(1)(i). (App. 35-36.) Because MCI had not yet answered Petitioner's Amended Complaint, the case was dismissed, and Petitioner circumvented the district court's ruling. (App. 36.)

On the next business day after the hearing, Petitioner commenced an arbitration against MCI before J.A.M.S./Endispute ("JAMS"), the appropriate arbitration administrator as established by the arbitration rules in the Tariff. (R. Ad. 28.) JAMS appointed as arbitrator a former chief justice of the Massachusetts Superior Court. (R. 2169.) Neither party objected to the appointment, finding the arbitrator to be unbiased, impartial, and qualified. (R. Ad. 30; R. 2169; App. 28.)

In its Notice of Claim in the arbitration, Petitioner submitted a copy of the Amended Complaint from the action that Petitioner had voluntarily dismissed, and asked the arbitrator to decide: (1) whether the claims alleged in the Amended Complaint were arbitrable, and (2) whether the arbitrator had jurisdiction to award all of the relief sought by Petitioner, including punitive damages and attorneys' fees.[3/] (R. 2031-34.) Consistent with its strategic maneuvering in the district court, Petitioner also sought to hedge its bets by indicating that it would not consider itself bound by a decision

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3/ The arbitrator eventually concluded that Petitioner's claims were arbitrable. (R. 2303-04.)

that Petitioner's claims were arbitrable. (App. 4; R. 973-74, 2033.)

In an effort to eliminate uncertainty regarding the arbitrability issue, MCI filed suit in the District of Massachusetts seeking a declaratory judgment that Petitioner must arbitrate its claims. (R. 988.) It is this action that gave rise to the appeal underlying this Petition.

On October 10, 1996, the district court entered an order holding that the arbitration clause in the Agent Agreement is valid and enforceable, and that Petitioner therefore was required to arbitrate all disputes relating to the contract, including the claims that Petitioner had voluntarily dismissed. (App. 25-26.) Petitioner appealed that order.

While its appeal was pending, Petitioner filed a motion in the district court under Federal Rule of Civil Procedure 60(b) seeking to vacate the order compelling arbitration. In its Rule 60(b) motion, Petitioner claimed, among other things, that MCI had fraudulently induced Petitioner to agree to the arbitration clause in the Agent Agreement by failing to disclose the existence of an agreement between MCI and JAMS that governs the terms and logistics for JAMS' administration of arbitrations under MCI's Tariff arbitration rules. (R. 1143.)

On March 20, 1997, the district court heard argument on Petitioner's Rule 60(b) motion. During the hearing, Petitioner conceded that the Tariff identified JAMS as the administrator for all arbitrations under MCI's Tariff arbitration rules. (App. 28.) Petitioner also conceded that corporate arbitration programs are "commonplace." (App. 28.) Finally, Petitioner conceded that it was not challenging the impartiality of the arbitrator appointed by JAMS to hear its dispute with MCI. (*See* App. 28.)

On March 27, 1997, the district court entered an order denying Petitioner's Rule 60(b) motion. The court found that the Rule 60(b) motion failed "the due diligence test" for the discovery of new evidence and flunked "the materiality test" for the importance of that evidence. (App. 28.)

Petitioner appealed the district court's order denying the Rule 60(b) motion. The First Circuit consolidated that appeal with Petitioner's earlier appeal from the October 10, 1996 order compelling arbitration.

In a consolidated decision rendered on January 27, 1998, the First Circuit unanimously affirmed both orders entered by the district court. (App. 1-23.)

In the first appeal, the court of appeals held that the arbitration clause in the Agent Agreement applies to any dispute relating to the Agent Agreement, including all of the claims that Petitioner had asserted in its earlier lawsuit. (App. 9-11.) The court rejected Petitioner's argument that because the arbitration clause incorporates the Tariff arbitration rules, only customer billing disputes may be arbitrated under the Agent Agreement. (App. 9-10.) Instead, the court ruled that the Tariff's arbitration rules were incorporated merely to provide "a set of procedural rules for arbitrations arising from the Agent Agreement."[4/] (App. 9-10.)

4/ Similarly, the court of appeals rejected Petitioner's argument that the reference in the arbitration clause to the Tariff "rules" incorporated all of the "Rules and Regulations" section in the Tariff, which contains a set of general provisions -- such as service descriptions, liability limitations, payment procedures, and the like -- governing the terms and conditions of MCI's provision of service to its customers. The court

Having affirmed the original order compelling arbitration, the court turned to Petitioner's appeal from the order denying the Rule 60(b) motion. In that appeal, Petitioner raised a variety of arguments attempting to show that the JAMS administration agreement evidenced an improper relationship between MCI and JAMS and suggested bias in favor of MCI. The First Circuit rejected each of Petitioner's contentions.

Employing an abuse-of-discretion standard, (App. 17), the court first affirmed the district court's finding that the JAMS administration agreement was not material because it would have not have had a significant effect on the district court's earlier decision compelling arbitration. (App. 19.) Although Petitioner complained that the JAMS agreement contained an "undisclosed" rule prohibiting the arbitrator from making findings of fact and conclusions of law, the court of appeals noted that the law does not require arbitrators to give any reasons at all for an award and found that, in any event, "there is no reason whatever to think that Matrix would have regarded such a position as material." (App. 20-21.) In addition, the

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found it "much more reasonable" to interpret the reference to "rules" as referring to "the limited set of rules concerning arbitration than to all nineteen rules contained in Section B of the Tariff on a broad range of subjects." (App. 10-11.) The First Circuit also dismissed Petitioner's argument that MCI had fraudulently induced it to enter into the arbitration clause through representations from MCI officials that the clause applied only to customer billing disputes. The court held that Petitioner waived that argument by failing to raise it in a timely fashion in the district court, a violation of the court's "bedrock principle that new arguments may not be made on appeal." (App. 12.)

court rejected Petitioner's argument that findings of fact and conclusions of law were required to establish a "willful misconduct" exception to a limitation-of-liability provision in the Tariff, finding that provision was "inapplicable" to Petitioner's claim.[5/] (App. 20.)

The court of appeals next rejected Petitioner's argument that the JAMS agreement evidenced improper "payments and perks" by MCI to JAMS that could create bias in favor of MCI. (App. 21.) Noting that the services that were to be provided by MCI to JAMS under the agreement were for use in connection with the tasks JAMS was required to provide under the contract, the court stated that it saw "nothing sinister in the communications company contracting to provide the 'tools' for the work it seeks to obtain from its contractor, particularly when those tools are its stock-in-trade." (App. 21.) Furthermore, the court recognized that the payments specified in the contract were for the administrative services provided by JAMS. (App. 21.)

Third, the court of appeals rejected Petitioner's argument that the JAMS administration agreement was "undisclosed" for purposes of Rule 60, holding that Petitioner knew or should have known that JAMS had a contractual relationship with MCI because the Tariff arbitration rules prominently disclosed JAMS as the administrator of MCI's arbitration program. (App. 22.) As the court recognized, "Matrix should have

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5/ The limitation-of-liability provision is located in the general Rules and Regulations section of the Tariff and not in the arbitration rules. The court noted that the issue was moot because the arbitrator had already announced his intention to make findings and conclusions notwithstanding the prohibition in the JAMS agreement. (App. 20.)

known as well that the two parties [MCI and JAMS] must have spelled out their working relationship in some form; we think it virtually inconceivable that there would be no written contract between them." (App. 22.) The court dismissed Petitioner's argument that the content of the agreement was "secret," observing that "many of the terms Matrix claims to find shocking in the MCI/JAMS Agreement were included in MCI's public request for bids for a contract to administer its arbitration program." (App. 22.)

Finally, the First Circuit rejected Petitioner's argument that the existence of the JAMS agreement demonstrated bias in the arbitration process. (App. 22-23.) The court noted that MCI's contract was with the arbitration administrator -- not the arbitrator -- and that MCI did not have any contacts with the arbitrators who were deciding cases. (App. 22.) The court of appeals further concluded that, on the facts of this case, Petitioner's suggestion that a JAMS arbitrator would be biased in favor of MCI was "contradicted by [Petitioner's] explicit assurance that it did not doubt the impartiality of the arbitrator assigned to its case." (App. 23.)

ARGUMENT

The Petition does not present an issue appropriate for this Court's review. The decision below simply applied the unambiguous language of an arbitration clause to a particular dispute and held that the district court's denial of a Rule 60(b) motion to vacate an order compelling arbitration was well within the appropriate range of discretion. While Petitioner claims that the court of appeals' decision conflicts with this Court's decision in *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968), the two decisions are in fact entirely consistent. Unlike in *Commonwealth Coatings*, MCI in this case has no relationship

with the arbitrators who actually decide disputes and Petitioner does not claim the arbitrator is biased. Likewise, Petitioner's effort to transform this contract case into a dispute governed by the filed-tariff doctrine is unavailing. It is Petitioner's agency contract with MCI, not MCI's Tariff, that controls Petitioner's relationship with MCI. Finally, Petitioner's attempt to manufacture a circuit split between the decision below and the Ninth Circuit's decision in *Graham Oil Co. v. ARCO Products Co.*, 43 F.3d 1244 (9th Cir.), *cert. denied*, 116 S. Ct. 275 (1995), fails because this case does not involve a statute enacted to protect parties in Petitioner's position. To the extent that Petitioner reads *Graham Oil* broadly to bar any limitations on the remedies available in arbitration, that construction has been effectively superseded by this Court's decision in *Mastrobuono v. Shearson, Lehman Hutton, Inc.*, 115 S. Ct. 1212 (1995).

This Petition is the latest in a protracted series of efforts by Petitioner to avoid arbitration. Petitioner began by contesting the scope of the arbitration clause in the district court. When that argument was rejected, Petitioner dismissed its own lawsuit to dodge the court's impending order compelling arbitration, which the court had outlined in open court during the hearing. Then, when MCI filed another action to resolve the arbitrability issue and the court issued a binding order compelling arbitration, Petitioner filed a Rule 60(b) motion seeking to vacate that order, claiming that the JAMS agreement biased the arbitration process. When that argument also failed, Petitioner, in its appeal, raised new arguments, not timely presented in the district court, attempting to challenge the validity and enforceability of the arbitration clause on grounds of fraud. Now that the First Circuit has affirmed the district court's orders, Petitioner seeks discretionary review by this Court, raising yet another new argument to avoid compliance with the arbitration provision of the contract in question.

As demonstrated below, Petitioner's effort to avoid arbitration and transform a run-of-the-mill commercial dispute into a matter worthy of Supreme Court review should be rejected.

I. THE DECISION BELOW AFFIRMING THE DENIAL OF PETITIONER'S RULE 60(B) MOTION WAS PLAINLY CORRECT AND IS CONSISTENT WITH THE CONTROLLING PRECEDENTS OF THIS COURT.

In Question One, Petitioner seeks review of the First Circuit's decision affirming the district court's denial of Petitioner's Rule 60(b) motion. In that motion, Petitioner argued that the existence of an administrative agreement between MCI and JAMS, the company that administers arbitrations under MCI's Tariff, "nullifies any waiver" by Petitioner of its right to a jury trial -- *i.e.*, its agreement to arbitrate. Petitioner further alleged that it had recently become aware of the agreement between MCI and JAMS, and argued that the agreement constituted an improper relationship between MCI and JAMS sufficient to invalidate the arbitration clause in the Agent Agreement.

The issue before the First Circuit was whether the district court had abused its discretion in denying Petitioner's Rule 60(b) motion. (App. 17.) In order to vacate a final judgment under Rule 60(b), a movant must present newly discovered evidence that could not have been discovered in time to move for a new trial under Rule 59(b). Fed. R. Civ. P. 60(b)(2). In addition, the movant must show that the newly discovered evidence is of such a material and controlling nature as would probably have changed the outcome of the proceeding. *See, e.g., Hoult v. Hoult*, 57 F.3d 1, 6 (1st Cir. 1995). A district court's decision denying a Rule 60(b) motion is reviewed for

abuse of discretion. *Browder v. Director, Dept. of Corrections*, 434 U.S. 257, 263 n. 7 (1978).

The court of appeals clearly understood those standards and faithfully applied them, arriving at a decision that is correct and unworthy of further review. MCI respectfully suggests that this Court does not sit to review application of an abuse-of discretion standard to the denial of a motion to vacate a judgment under Rule 60(b).

Nor does the underlying issue -- whether an administrative agreement between a corporation and an arbitration administrator evidences bias in the arbitration process -- warrant review here. The court of appeals' holding that, on the facts of this case, the administration agreement would not have been material and that Petitioner should have known of the agreement's existence during the original proceeding does not conflict with the decisions of this Court or of any other circuit. Moreover, the dearth of case law on the issue (all of which, in any event, is consistent with the First Circuit's decision) is testament to the fact that the issue simply is not one of substantial importance.

Petitioner attempts to justify review of this issue by asserting that the decision below conflicts with the Court's decision in *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968). There is no merit to this argument.

In *Commonwealth Coatings*, the Court vacated an arbitration award because one of the arbitrators had significant business dealings with a party and failed to disclose that business association to the other participants in the arbitration. *Commonwealth Coatings Corp.*, 393 U.S. at 146. Here, in contrast, MCI, like many other corporations, merely has an

agreement with an organization to administer an arbitration program. MCI has no relationship with the arbitrators themselves, who are independent and who are bound by a Code of Ethics. As the court of appeals recognized, none of the contacts between MCI and JAMS reflected in the administration agreement involve the arbitrators who are deciding cases. (App. 22.)

This distinction between an arbitrator and arbitration administrator is critical. Indeed, every court to consider the issue has rejected the argument that an arbitration process will be biased because of a relationship between a party and the arbitration administrator. *See, e.g., Doctor's Assocs. v. Stuart*, 85 F.3d 975, 981 (2d Cir. 1996); *Doctor's Assocs. v. Jabush*, 89 F.3d 109, 112 (2d Cir. 1996); *Hunt v. Mobil Oil Corp.*, 654 F. Supp. 1487, 1499 (S.D.N.Y. 1987); *cf. Sheet Metal Workers v. Kinney Air Conditioning Co.*, 756 F.2d 742, 746 (9th Cir. 1985).

The fact that the courts uniformly reject claims of bias that are based on a relationship between a party and the arbitration administrator demonstrates that the Petition does not present a substantial question of law, and firmly supports the reasoning of the court of appeals. As the court of appeals correctly observed, the JAMS agreement would not have been material to Petitioner's decision whether to enter into the arbitration agreement, and would not have changed the outcome of MCI's motion to compel arbitration. (App. 22.)

The agreement establishes JAMS as the administrator for certain arbitrations commenced under MCI's Tariff and establishes an organized infrastructure for those arbitrations. That infrastructure benefits both parties equally and creates an efficient process. JAMS, for example, provides a centralized case scheduling and tracking system, an electronic docketing

system, and a case manager for every matter. (R. 1186-89.) It also maintains a panel of arbitrators who have "demonstrated neutrality and impartiality in professional practice" and requires that they execute an oath of office and agree to abide by the Code of Ethics for Commercial Arbitrators. (R. 1189-90.) The arbitrators are not employees of JAMS, are not parties to the JAMS agreement, and have no professional relationship with MCI. (*See* R. 1189-90, 1740.) Thus, Petitioner's bold assertion that the arbitrators -- former judges, respected practitioners, and the like -- will depart from their Code of Ethics is unfounded. And Petitioner's attempt to avoid arbitration on this ground borders on the frivolous given its concession before the district court that it does not challenge the impartiality of the arbitrator assigned to its case. (App. 23.)

Equally important, Petitioner ignores the Rule 60(b) procedural framework in which this issue arose. As the court of appeals concluded, Petitioner nevertheless would have lost below because it knew or should have known of the existence of the JAMS agreement. MCI's Tariff publicly disclosed that JAMS was the administrator for all arbitrations under the Tariff, MCI's agreement with JAMS was the subject of publicity and public discussion, and private corporate-sponsored arbitration programs in general are common and have been the subject of public news articles. (R. 1783-87.) The court of appeals correctly concluded that Petitioner knew or should have known of the existence of the JAMS agreement because it would be "virtually inconceivable that there would be no written contract between [JAMS and MCI]." (App. 22.)

In sum, the First Circuit's affirmance of the denial of Petitioner's Rule 60(b) motion presents no substantial question of law worthy of the Court's review, was fully consistent with prior decisions of the Court, and was plainly correct.

II. THIS IS A CONTRACT CASE AND DOES NOT INVOLVE THE FILED-TARIFF DOCTRINE OR ANY OTHER "TARIFF FILING REQUIREMENTS."

In Question Two, Petitioner for the first time invokes the federal filed-tariff doctrine, arguing that MCI violated "tariff filing requirements" by not explicitly disclosing the existence of the JAMS agreement in its Tariff. Petitioner has waived this issue because Petitioner failed to raise it before the district court or the court of appeals. *See, e.g., United States v. Alvarez-Sanchez*, 511 U.S. 350, 359 n.5 (1994). Even if it were not waived, Question Two does not present a substantial question of law warranting review by the Court.

Petitioner's invocation of the filed-tariff doctrine and its repeated references to "tariff filing requirements" are red herrings because this dispute between MCI and Petitioner is controlled by their agency contract, not MCI's Tariff. As a common carrier under the Federal Communications Act, 47 U.S.C. § 151 *et seq.*, MCI has filed a tariff with the Federal Communications Commission that contains all of MCI's charges, classifications, practices, and regulations for the provision of telecommunications service to its telecommunications customers. 47 U.S.C. § 203(a). While, as Petitioner correctly notes, tariffs "conclusively and exclusively control the rights and liabilities between a carrier and its customer," *MCI Telecomms. Corp. v. Graham*, 7 F.3d 477, 479 (6th Cir. 1993), they do not govern the carrier's other business relationships, including those with agents like Petitioner.

In a similar vein, Petitioner misapplies the filed-tariff doctrine when it contends that MCI was required to disclose the JAMS agreement in the Tariff because of "tariff filing requirements" prohibiting the use of "side agreements." (Petition 19-21.) It is true that in a carrier-customer context, a

carrier's filed tariff supersedes any "side agreements" between a carrier and a customer concerning the provision of telecommunications service at charges, rates, classifications, or practices different from those specified in the tariff. 47 U.S.C. § 203(c); *Marco Supply Co. v. American Tel. & Tel. Co.*, 875 F.2d 434, 436 (4th Cir. 1989); *see also Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 (1981); *Armour Packing Co. v. United States*, 209 U.S. 56, 81 (1908). But the prohibition of "side agreements" applies only to those agreements with customers concerning the provision of services at terms that contradict the tariff.

At bottom, this case concerns only the interpretation of an arbitration clause in a private, commercial agency contract between MCI and Petitioner. MCI's Tariff is relevant to this action only insofar as it is the document from which the arbitration rules are borrowed by the separate, independent arbitration clause in the Agent Agreement. (*See* App. at 9-10.) Thus, the issue presented below simply involved the incorporation by reference doctrine, a staple of contract law. This dispute is not a filed-tariff doctrine case and does not implicate any of the attendant federal tariff policies.

III. THE TARIFF'S LIMITATION OF LIABILITY EXCEPTION FOR "WILLFUL MISCONDUCT" DOES NOT AFFECT PETITIONER'S CONTRACTUAL OBLIGATION TO ARBITRATE.

In Question Three, Petitioner suggests that it is not required to arbitrate its disputes because of a "willful misconduct" exception to the limitation-of-liability provision in MCI's Tariff. The limitation-of-liability provision is found in the general Rules and Regulations section of the Tariff, and it limits MCI's liability in connection with disputes with its customers over the installation, provision, maintenance or

termination of telecommunications services. (R. 2374.) The "willful misconduct" provision cited by Petitioner operates as an exception to that limitation of liability. It provides that "MCI's liability for willful misconduct, if established as a result of judicial or administrative proceedings, is not limited by this tariff." (R. 2374.)

Question Three does not present any important legal question for review by this Court. In a tortured syllogism, Petitioner argues that because it alleges willful misconduct against MCI, the willful-misconduct exception to the limitation-of-liability provision in the Tariff affords Petitioner an "absolute right to proceed in Court." (Petition at 22.) Petitioner is wrong.

Even if the willful misconduct exception applied here -- which it does not because this is not a carrier-customer dispute governed by the Tariff -- nothing in that exception nullifies Petitioner's independent and voluntary agreement to arbitrate disputes related to the Agent Agreement. As the court of appeals recognized, the Agent Agreement arbitration clause does not incorporate the "willful misconduct" exception to the limitation of liability provision in MCI's Tariff. (App. 20.) Rather, "[t]he only sensible reading [of the arbitration clause] is that the Tariff was incorporated to provide a set of procedural rules for arbitrations arising from the Agent Agreement." (App. 9-10.)

Finally, Petitioner's reliance on *MCI Telecommunications Corporation v. TCI Mail, Inc.*, 772 F. Supp. 64 (D.R.I. 1991), is misplaced. *TCI Mail* holds that all the terms and conditions contained in the Tariff, including the "willful-misconduct" exception, must be considered when a court determines the effect of the Tariff on a rate dispute governed by the Tariff. *TCI Mail*, 772 F. Supp. at 67-68. *TCI Mail* did not, however,

address the issue whether the willful-misconduct exception permits a party to litigate in court notwithstanding the existence of a separate agency contract containing an arbitration agreement requiring that party to arbitrate all of its disputes. Unlike *TCI Mail*, which involved a carrier-customer relationship governed by the Tariff, the Tariff is relevant here only insofar as the arbitration clause in the Agent Agreement incorporates by reference the arbitration rules contained in the Tariff. The willful-misconduct exception was not incorporated into the arbitration agreement and is not relevant to this dispute.

IV. THERE IS NO CONFLICT BETWEEN THE FIRST AND NINTH CIRCUITS.

In its final effort to obtain review, Petitioner argues that the arbitration provision in the Agent Agreement is unenforceable because it precludes Petitioner from recovering multiple damages under the Massachusetts consumer fraud statute and under the Lanham Act; from recovering attorneys' fees under those two statutes and the Federal Communications Act; from taking advantage of a two-year limitations period under the Communications Act; and from obtaining "interlocutory" relief from the arbitrator. (Petition 26-28.) Petitioner bases its argument on Section B-7.13812 of the Tariff Arbitration Rules, which provides:

> The arbitrator is empowered to award remedies allowed by law and to grant final and complete relief. Notwithstanding this authority, the arbitrator may not award any interlocutory relief, including temporary or preliminary injunctions, nor may the arbitrator award punitive damages, treble damages, or penalties other than those provided in any applicable publicly filed tariff, nor may the arbitrator assess attorney's fees.

(R. Ad. 32.)

Like the other questions posed in the Petition, this issue is inappropriate for the Court's review. The decision below does not present an important question of federal law, and does not conflict with this Court's prior decisions or with the decisions of any other circuit. In addition, like the issue in Question Two, Petitioner waived this argument by failing to raise it in the district court.[6/]

The court of appeals properly rejected this argument because under the applicable arbitration rules, Petitioner must present any issues concerning limitation of remedies to the arbitrator, not to a court. *See Great W. Mortgage Corp. v. Peacock*, 110 F.3d 222, 230-31 (3d Cir.) (once a dispute is deemed arbitrable, any argument that provisions of the arbitration agreement involve a waiver of substantive rights afforded by the state statute should be presented in arbitration), *cert. denied*, 118 S. Ct. 299 (1997); *Paine Webber, Inc. v. Elahi*, 87 F.3d 589, 599-600 (1st Cir. 1996). Here, the arbitration rules incorporated by the arbitration clause in the Agent Agreement specifically provide that the arbitrator must determine questions concerning jurisdiction and application of the arbitration rules. (R. Ad. 33.) The court of appeals recognized this fundamental problem with Petitioner's claim, and summarily rejected it for this reason. (App. 14 n.12.)

Moreover, even if this argument could be raised in court instead of arbitration, it fails because it is well established that

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6/ The court of appeals expressly noted the "question of waiver" surrounding this issue, but quickly rejected the argument on other grounds without reaching the waiver issue. (App. 14 n.12.)

a party may contract to limit available remedies. *See Mastrobuono v. Shearson, Lehman Hutton, Inc.*, 115 S. Ct. 1212, 1214 (1995). Petitioner validly contracted to arbitrate disputes pursuant to a set of arbitration rules that circumscribed its ability to obtain certain forms of relief.[7/] And Petitioner's claim that the arbitration rules deprive Petitioner of the right to obtain injunctive relief (Petition at 27) is frivolous. The arbitration rules to which Petitioner agreed prohibit "interlocutory" relief, but do not prohibit permanent *injunctive* relief. (*See* R. Ad. 32.)

Finally, Petitioner's attempt to manufacture a circuit split on this issue is specious. According to Petitioner, the decision below conflicts with the Ninth Circuit's decision in *Graham Oil Co. v. ARCO Products Co.*, 43 F.3d 1244 (9th Cir.), *cert. denied*, 116 S. Ct. 275 (1995). In *Graham Oil*, the court of appeals reversed an order compelling arbitration on the ground that the arbitration clause's limitation of remedies violated the Petroleum Marketing Practices Act, a statute that had been enacted to provide specific remedies to petroleum franchisees who were at the mercy of petroleum franchisors' superior bargaining power. As the court of appeals recognized, the two statutes under which Petitioner has asserted claims, the Lanham Act and Mass. Gen. Laws c.93A, unlike the Petroleum Marketing Practices Act, are not statutes that were created

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7/ Petitioner also ignores that the Agent Agreement independently precludes recovery of many of the damages sought by Petitioner. Paragraph 15(d) of the Agent Agreement provides that "NEITHER PARTY WILL BE LIABLE TO THE OTHER FOR SPECIAL, INDIRECT, CONSEQUENTIAL DAMAGES, WHETHER OR NOT FORESEEABLE, OR PUNITIVE DAMAGES." (App. 57, capitalization in original.)

specifically for the purpose of protecting parties in Petitioner's position. (App. 14 n.12.)

Moreover, to the extent that Petitioner construes *Graham Oil* to hold that parties cannot contract to limit the remedies available in arbitration, that construction cannot be considered good law in light of the Court's decision in *Mastrobuono v. Shearson, Lehman Hutton, Inc.*, 115 S. Ct. 1212, 1214 (1995). *Mastrobuono* stands for the proposition that courts should effect the intent of parties' contractual agreements to arbitrate, even if that means enforcing the parties' agreement to limit the remedies available in arbitration. *See Mastrobuono*, 115 S. Ct. at 1216 (quoting *Volt Information Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 479 (1989)); *see also National Union Fire Ins. Co. v. Belco Petroleum Corp.*, 88 F.3d 129, 134 (2d Cir. 1996); *Kuehner v. Dickinson & Co.*, 84 F.3d 316, 320 (9th Cir. 1996); *Elahi*, 87 F.3d at 593; *Gateway Techs., Inc. v. MCI Telecomms. Corp.*, 64 F.3d 993, 998 (5th Cir. 1995). Here, Petitioner and MCI agreed to arbitrate all disputes in accordance with arbitration rules that prohibited the recovery of treble damages and attorneys' fees. The court of appeals understood this dynamic and properly rejected Petitioner's attempt to invalidate the arbitration clause in view of Petitioner's own agreement to limit the remedies available in arbitration.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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